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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY, PETITIONER

v.

JOSE GOMEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether respondent's individual claim for damages became moot when petitioner offered to pay respondent an amount greater than the maximum damages that respondent could have obtained by litigating that individual claim to judgment, and respondent did not accept the offer.

2. Whether respondent's assertion of a class claim under Federal Rule of Civil Procedure 23 alters the proper mootness analysis.

3. Whether petitioner was entitled to "derivative sovereign immunity" from respondent's suit because respondent's claims arose out of petitioner's performance of a contract with the federal government.

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INTEREST OF THE UNITED STATES

This case presents the question whether a defendant can moot a putative class action by offering to pay the named plaintiff the full amount of damages that the plaintiff could obtain by successfully litigating his individual claim to judgment. The United States has a significant interest in the resolution of that question. The United States is charged with enforcing numerous laws establishing private rights of action through which individuals may seek redress in individual or class actions. The United States is also a potential defendant in such suits.

This case presents the further question whether a federal contractor may be held liable for violating the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227, if the contractor's allegedly unlawful

actions were taken while executing a contract with the federal government. The United States has a substantial interest in that question, both because the Federal Communications Commission (FCC) administers the TCPA and because the liability of numerous federal contractors could be affected by the Court's decision.

STATEMENT

1. As relevant here, the TCPA prohibits "any person" in the United States from "mak[ing] any call * * * using any automatic telephone dialing system" to "any telephone number assigned to a * * * cellular telephone service," unless the call is made "for emergency purposes" or with the "prior express consent of the called party." 47 U.S.C. 227(b)(1)(A)(iii). The FCC has authority to adopt regulations implementing Section 227(b) and to issue "rules[s] or order[s]" addressing questions arising under the Act. 47 U.S.C. 227(b)(2); see 47 U.S.C. 154(i). The FCC has construed the TCPA prohibition described above as applying to both "voice calls and text calls to wireless numbers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14,115 (2003). Neither party disputes that interpretation. Pet. App. 3a.

Congress created a private right of action to redress violations of Section 227(b) through damages or injunctive relief. 47 U.S.C. 227(b)(3); see *Mims* v. *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012). In such an action, the plaintiff is entitled "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. 227(b)(3). A court may

treble the damages award if it finds that the defendant violated the TCPA "willfully or knowingly." *Ibid.*

2. In performing a marketing contract with the United States Navy, petitioner caused to be sent approximately 100,000 text messages. Pet. App. 2a; Pet. 5. Under that contract, petitioner was responsible for developing and implementing a Navy recruiting campaign targeting young adults. Pet. App. 2a. Although the Navy approved the content of a text message, *ibid.*, it "intended the messages to be sent only to individuals who had consented or 'opted in' to receive messages like the recruiting text," *id.* at 4a. Construed in the light most favorable to respondent (the non-moving party), the summary-judgment evidence indicated that "[petitioner] was not authorized to send texts to individuals who had not opted in," *ibid.*, and that petitioner had agreed "to send [the] messages only to cellular users that had consented to solicitation," *id.* at 2a.

Petitioner hired a subcontractor, MindMatics, to generate a list of opt-in recipients and send the text message to them. Pet. App. 2a. Respondent contends that he received a text message without his consent. *Id.* at 2a-3a; J.A. 20.

3. In 2010, respondent filed this suit in federal district court. Pet. App. 2a. His class-action complaint (J.A. 16-24) alleged that petitioner had violated the TCPA by sending text messages to respondent's and others' cellular phones without consent. J.A. 20, 23. The complaint asked the district court to certify a class of all persons who had received one or more "unauthorized text message advertisements" from petitioner. *Ibid.* The complaint also requested injunc-

tive relief, trebled actual and statutory damages, and reasonable attorney's fees and costs. J.A. 23.

Before petitioner responded to the complaint, the parties stipulated that the class-certification-motion deadline should be extended until after petitioner had filed its response and respondent had received an opportunity to conduct precertification discovery. Pet. App. 37a. Petitioner agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before [petitioner] ha[d] responded to the Complaint and before any threshold motions [had been] resolved." *Ibid.*

Before discovery commenced, petitioner tendered to respondent an offer of judgment (Pet. App. 52a-56a) under Federal Rule of Civil Procedure 68. See Pet. App. 48a. A valid Rule 68 settlement offer must, *inter alia*, propose entry of judgment for the plaintiff on specified terms, Fed. R. Civ. P. 68(a), and may "not implicitly or explicitly provide that the judgment *not* include costs." *Marek* v. *Chesny*, 473 U.S. 1, 6 (1985). If the plaintiff accepts a valid Rule 68 offer within 14 days and a party "file[s] the offer and notice of acceptance" with proof of service, the district court clerk must enter judgment accordingly. Fed. R. Civ. P 68(a). If the plaintiff does not accept the offer and ultimately obtains a judgment no more favorable than the offer, the plaintiff must pay the "costs" incurred after the offer was made, including any attorney's fees properly treated as "costs." Fed. R. Civ. P. 68(d); see *Marek*, 473 U.S. at 10-11. Rule 68 further provides that "[a]n unaccepted offer is considered withdrawn," and that "[e]vidence of an unaccepted offer is not

admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

Petitioner's Rule 68 offer proposed the entry of a district court judgment against petitioner that would have awarded respondent (a) permanent injunctive relief, (b) $1503 in damages for each unauthorized text message that respondent had received, and (c) "reasonable costs allowable under law." Pet. App. 53a; see *id.* at 55a-56a (proposed injunction). Petitioner's contemporaneous settlement letter (*id.* at 57a-59a) explained that its "offer d[id] not include attorneys' fees" requested in respondent's complaint. *Id.* at 58a. Consistent with Rule 68, the offer stated that it "shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service." *Id.* at 54a. Because respondent failed to respond within 14 days, the offer "lapse[d] in accordance with its own terms." *Id.* at 3a.

Petitioner then moved to dismiss the action for want of jurisdiction, arguing that the unaccepted Rule 68 offer had rendered respondent's claim moot. On the same day, respondent moved for class certification. J.A. 7-8. The district court denied petitioner's motion to dismiss, Pet. App. 40a-49a, and struck from the record the offer of judgment (*id.* at 52a-56a) that petitioner had filed, explaining that "Rule 68 does not allow a party to file a Rule 68 offer unless it has been accepted," *id.* at 49a. The court deferred ruling on class certification "until after the parties have had an opportunity to engage in class discovery." *Id.* at 50a.

After limited discovery, petitioner moved for summary judgment, arguing that its status as a federal contractor entitled it to "derivative sovereign immunity." Pet. App. 30a; J.A. 11. Cf. Dist. Ct. Doc. 129

(10/31/2011) (discovery status report). The district court granted petitioner's motion. Pet. App. 22a-34a. The court concluded that, "[i]nasmuch as [petitioner] acted on behalf of the Navy, it is also immune under the doctrine of derivative sovereign immunity established by the Supreme Court in *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21-22 [1940]." *Id.* at 30a; see *id.* at 30a-34a. The district court entered final judgment (J.A. 14) without separately denying respondent's pending motion for class certification.

4. The court of appeals vacated and remanded. Pet. App. 1a-21a. As relevant here, the court held that petitioner's unaccepted offer of judgment did not moot respondent's action, *id.* at 4a-7a, and that petitioner was not entitled to "derivative sovereign immunity," *id.* at 14a-20a.[1]

a. The court of appeals rejected petitioner's mootness argument, relying on its then-recent holding that "[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." Pet. App. 5a (quoting *Diaz* v. *First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)).[2] The court further held that an unaccepted

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[1] The court rejected petitioner's remaining contentions, including petitioner's argument that it could not be held vicariously liable for the actions of its subcontractor. Pet. App. 10a-14a.

[2] In *Diaz*, the court of appeals noted that a majority of the Court in *Genesis HealthCare Corp.* v. *Symczyk*, 133 S. Ct. 1523 (2013), had reserved the question, but that four dissenting Justices and the Solicitor General had concluded that an unaccepted offer of judgment could not moot a plaintiff's underlying claim. 732 F.3d at 952-953. *Diaz* concluded that "Justice Kagan['s dissenting opinion in *Genesis HealthCare*] has articulated the correct approach." *Id.* at 954; see *id.* at 953-955.

offer of judgment likewise does not render a class action moot. *Id.* at 5a-7a.

b. The court of appeals held that the district court had erred by granting petitioner derivative sovereign immunity. Pet. App. 14a-20a. The court stated that this Court's decision in *Yearsley*, which involved a contractor whose damage-causing actions were required by its contract with the United States, was "not applicable" because *Yearsley* had "established a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* at 15a.

SUMMARY OF ARGUMENT

I. Neither petitioner's offer to settle this case by paying respondent the full value of his individual claim, nor respondent's failure to accept that offer, rendered this case moot.

A. Petitioner's settlement offer did not moot respondent's individual claim. If the mere communication of a Rule 68 offer of judgment could moot a case, the offer would foreclose the court from performing the action—entry of judgment for the plaintiff in accordance with the offer—that Rule 68(a) mandates if the offer is accepted. And if the mere communication of an offer to pay the plaintiff's individual claim in full does not moot the case, the plaintiff's refusal to accept the offer cannot have that effect. Under Rule 68(b), "[a]n unaccepted offer is considered withdrawn," and the plaintiff is left as before with an unsatisfied claim that a court can redress if the claim is found to have merit.

Although petitioner argues that respondent's individual claim is moot, petitioner also contends that the district court may enter judgment in respondent's favor on that claim in accordance with petitioner's

prior Rule 68 offer. That combination of arguments is self-contradictory, because a district court that has been divested of jurisdiction can do nothing more than dismiss the case. Although entry of judgment in the plaintiff's favor is sometimes the appropriate course of action when the defendant offers to capitulate, the propriety of that disposition depends on the understanding that the offer does *not* render the case moot.

The nineteenth-century decisions of this Court on which petitioner relies do not support its cause. Those decisions address the effect of a plaintiff's *acceptance* of full payment, not the effect of an unaccepted settlement offer.

If a defendant offers to surrender by agreeing to *all* of the relief the plaintiff could realistically have obtained, and if further litigation would serve no other legitimate purpose, the court should enter judgment for the plaintiff in accordance with the defendant's offer, even if the plaintiff objects. Entry of judgment for the plaintiff, rather than dismissal of the action as moot, is the appropriate course of action in the (presumably rare) case where the plaintiff's obstinacy or vindictiveness prompts him to reject the defendant's capitulation. Entry of judgment in accordance with petitioner's Rule 68 offer would have been inappropriate, however, under the circumstances of this case. Petitioner's offer to pay the full value of respondent's individual claim did not give respondent all that he might have achieved by litigating the case, since entry of judgment on those terms would have prevented respondent from invoking the cost-sharing mechanisms of Rule 23.

B. Even if the Court concludes that petitioner's unaccepted settlement offer mooted respondent's indi-

vidual claim, respondent retained a litigable stake in the question whether class certification was appropriate, since certification of a class would have allowed respondent to shift litigation costs to other class members. That conclusion follows logically from this Court's decision in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), which petitioner has not asked the Court to overrule.

II. Petitioner is not entitled to "derivative sovereign immunity" from respondent's suit. This Court has consistently held that private companies performing work for the federal government do not acquire the government's own immunity from suit. Those decisions are consistent with the common-law rule that immunities are not delegable but rather are personal to those who possess them. Individuals who perform governmental functions may assert qualified immunity from liability for wrongs they commit in that capacity. But the question of qualified immunity is not before this Court, and petitioner cites no decision in which this Court has held that a corporate entity (as distinct from an individual) was entitled to such immunity, let alone demonstrate that it meets the distinct requirements of a qualified-immunity claim.

Because the United States and its agencies are not subject to the substantive prohibitions imposed by the TCPA, federal agencies have a "privilege" to engage in conduct that private actors could not lawfully undertake. The Navy therefore could lawfully have sent automated recruiting text messages to unconsenting recipients like respondent. Unlike immunities, privileges have traditionally been delegable, and the Navy might have been able to delegate to petitioner its privilege of making such calls. The Navy did not do

so, however, but instead authorized petitioner to send recruiting texts only to individuals who had opted in.

ARGUMENT

I. PETITIONER'S OFFER OF JUDGMENT DID NOT RENDER THIS CASE MOOT

A. Petitioner's Unaccepted Settlement Offer Did Not Render Moot Respondent's Individual Claim

The court of appeals correctly held that respondent's individual TCPA claim is not moot. Neither petitioner's communication of a settlement offer, nor respondent's failure to accept that proposal, deprived the district court of jurisdiction over that claim.

1. To establish an Article III "case" or "controversy," a plaintiff must show that he possessed Article III standing when "the action commence[d]." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (*Laidlaw*). "[A]n actual controversy must [also] be extant at all stages of review, not merely at the time the complaint is filed." *Genesis HealthCare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (citation omitted). "A case becomes moot," however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (quoting *Knox* v. *Service Emps. Int'l Union*, 132 S. Ct. 2277, 2287 (2012)); accord *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (same). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin*, 133 S. Ct. at 1023 (citation omitted).

A defendant's unaccepted offer to settle a plaintiff's claim does not render the claim moot because it does not prevent the court from granting the plaintiff relief. This

Court has long recognized that, because "an offer * * * imposes no obligation until it is accepted," the offeree's rejection of a settlement proposal "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry.* v. *Columbus Rolling Mill*, 119 U.S. 149, 151 (1886); see *Eliason* v. *Henshaw*, 17 U.S. (4 Wheat.) 225, 228 (1819). Rule 68 incorporates that longstanding principle. Rule 68(b) provides that "[a]n unaccepted offer is considered withdrawn," and that "[e]vidence of an unaccepted offer is not admissible, except in a proceeding to determine costs" under Rule 68(d).

The Court in *Genesis HealthCare* reserved the question whether an unaccepted offer of judgment can moot an individual plaintiff's claim. 133 S. Ct. at 1528-1529. The government argued (*id.* at 1528), however, and Justice Kagan's opinion for four dissenting Justices concluded, that "an unaccepted offer of judgment cannot moot a case." *Id.* at 1533 (Kagan, J., dissenting). The dissenting Justices explained that, if the plaintiff declines such an offer, both "her interest in the lawsuit" and "the court's ability to grant her relief" remain as they were before. *Ibid.*; see *id.* at 1535 (concluding that an unaccepted settlement offer "is a legal nullity" having no effect on a dispute's justiciability). Since *Genesis HealthCare* was decided, every court of appeals that has resolved the issue—including the Seventh Circuit, which overruled its earlier precedents on the question—has held that an unaccepted offer of judgment cannot moot a plaintiff's claim. See *Bais Yaakov* v. *ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at *5-*6 (1st Cir. Aug. 21, 2015); *Hooks* v. *Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at *3 (5th Cir. Aug. 12, 2015); *Chapman* v. *First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *3 (7th Cir. Aug.

6, 2015) (overruling earlier Seventh Circuit decisions by using the court's mini-en-banc process, see 7th Cir. R. 40(e)); *Tanasi* v. *New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015), petition for cert. pending, No. 15-84 (filed July 17, 2015); *Stein* v. *Buccaneers Ltd. P'ship*, 772 F.3d 698, 702-704 (11th Cir. 2014); *Diaz* v. *First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954-955 (9th Cir. 2013).[3]

2. The certiorari petition frames the question presented as whether a case becomes moot "when the plaintiff *receives* an offer of complete relief on his claim." Pet. i (emphasis added). That formulation, as well as similar language in petitioner's brief on the

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[3] In *Russell* v. *United States*, 661 F.3d 1371, 1374-1375, 1377 (2011), the Federal Circuit accepted the government's argument as appellee that the damages claim of the named plaintiff was rendered moot by the government's tender of a check that—like its payments to thousands of others in the putative class—covered the full amount claimed by the plaintiff (who declined to cash the check). The government relied on Federal Circuit precedent, which the government has since concluded is incorrect. See U.S. Amicus Br. at 13 n.1, *Genesis HealthCare*, *supra* (No. 11-1059).

When a plaintiff timely seeks retrospective relief for a past wrong, the wrong has been completed by the time the claim is filed. Any damages liability therefore is fixed and will continue until the claim is resolved by a judgment or a settlement agreement grounded, like any contract, on mutual assent.

Different considerations apply when a plaintiff seeks prospective relief for an ongoing or imminent injury caused by the defendant's challenged actions. If the defendant ceases those actions after the suit is filed, it can terminate the underlying injury and associated liability for prospective relief, regardless of the plaintiff's consent. Yet even in that "voluntary cessation" context, the claim for prospective relief becomes moot only if the defendant shows that it is "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189-190.

merits (see, *e.g.*, Br. 13, 16, 20, 21), suggests that this case became moot as soon as petitioner communicated its settlement offer. That cannot be right. If a settlement offer alone could moot a claim, the district court would lack authority to do the very thing that Rule 68(a) requires if the plaintiff accepts the offer: enter judgment for the plaintiff based on the parties' agreement. See *Chapman*, 2015 WL 4652878, at *3. "[N]o one thinks (or should think) that a defendant's offer to have the court enter a consent decree [or judgment] renders the litigation moot and thus prevents the injunction's [or judgment's] entry." *Ibid.*

In the district court, petitioner moved to dismiss this suit on mootness grounds immediately after the expiration of Rule 68(a)'s 14-day period for acceptance of a defendant's settlement offer. That timing suggests that petitioner viewed respondent's failure to accept the settlement offer within the prescribed period, rather than the initial communication of the offer, as the event that rendered this case moot. But if tendering the offer did not divest the court of jurisdiction, respondent's subsequent failure to accept it could not have that effect. "After the offer lapsed, just as before, [respondent] possessed an unsatisfied claim, which the court could redress by awarding h[im] damages." *Genesis HealthCare*, 133 S. Ct. at 1534 (Kagan, J., dissenting).[4]

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[4] Even when a plaintiff actually enters a settlement agreement that the defendant fulfills, if the plaintiff continues to assert a settled claim, that claim should be adjudicated against the plaintiff, not dismissed as moot. Such a settlement gives rise to the defense of "accord and satisfaction." See 2 Restatement (Second) of Contracts § 281 & cmt. a, at 381-382 (1981); 2 Restatement (First) of Contracts § 417 & cmt. a, at 785-786 (1932). Entry of a consent

3. The argument that respondent's action became moot (either when petitioner made its settlement offer or when respondent failed to accept it) logically implies that the district court should have dismissed the suit, leaving respondent empty-handed. "When [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause," because "[w]ithout jurisdiction the court cannot proceed at all." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). That disposition, which would produce the same practical outcome as a judgment in petitioner's favor, obviously could not be said to "afford the plaintiff complete relief." Pet. Br. 20.

To avoid the strange result that would logically follow from a finding of mootness, petitioner contends (Br. 10, 21) that a "case should be dismissed as moot" when a defendant offers to provide complete relief, but that the "court also has authority to dispose of the case by entering judgment according to the defendant's offer." That combination of arguments is self-contradictory. Because an event that moots a case thereby divests the district court of jurisdiction, "entering judgment according to the defendant's offer of complete relief" (*id.* at 10)—*i.e.*, entering judgment in favor of the plaintiff—is permissible only if the defendant's settlement offer does *not* moot the controversy. Although entry of judgment in

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judgment likewise supports a res-judicata defense. Those affirmative defenses, see Fed. R. Civ. P. 8(c)(1), are not jurisdictional, however, and may be forfeited if not timely asserted. See *Wood* v. *Milyard*, 132 S. Ct. 1826, 1832 (2012); *Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); *Illinois Cent. R.R.* v. *Adams*, 180 U.S. 28, 32 (1901) (holding that "res judicata * * * [i]s not a question affecting the jurisdiction of th[e] court") (citation omitted).

the plaintiff's favor is sometimes the appropriate course of action when a defendant offers to capitulate (see pp. 17-18, *infra*), that is not the disposition that petitioner requested in the courts below. Nor is petitioner's current advocacy of that disposition fairly encompassed within the first question presented in the certiorari petition, which asks "[w]hether a case becomes moot, *and thus beyond the judicial power of Article III*, when the plaintiff receives an offer of complete relief on his claim." Pet. i (emphasis added).[5]

4. Petitioner relies (Br. 16-18) on three nineteenth-century decisions of this Court. None suggests that an unaccepted settlement offer of complete relief moots the underlying claim.

In *California* v. *San Pablo & Tulare Railroad*, 149 U.S. 308, 308-309 (1893), California brought suit to recover state and county taxes from a railroad. The State asserted that it had not "accepted" the railroad's offer of a sum that was "equal to the [unpaid] taxes, penalties, interest, and attorney's fees * * * and costs" that the State sought. *Id.* at 311-312. The railroad had already paid that sum to the State, however, under a California statute that effectively accepted the railroad's payment

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[5] Petitioner indicates that, even if respondent's suit is dismissed as moot, petitioner intends to pay respondent in accordance with petitioner's prior settlement offer. Pet. Br. 22 n.6. We do not question the sincerity of that representation. If the suit is dismissed as moot, however, any such payment would be legally gratuitous, since (a) the legal effect of a mootness dismissal is that the plaintiff is entitled to nothing, and (b) petitioner's settlement offer was "withdrawn" by its own terms when respondent did not accept it within 14 days, see Pet. App. 54a. Petitioner's stated intent to make a legally gratuitous payment if the suit is dismissed cannot divest respondent of his practical stake in the litigation.

on the State's behalf. See *id.* at 312. Pursuant to state law, the railroad had deposited that payment into a California bank in the State's name and had provided notice thereof to the State. *Ibid.*

In dismissing the writ of error, the Court explained that any obligation of the railroad to pay the State had been "extinguished" by the railroad's deposit, which under state law "ha[d] the same effect as actual payment and receipt of the money" by the State. *San Pablo*, 149 U.S. at 313-314. The Court concluded that the State's "cause of action ha[d] ceased to exist," *id.* at 313, because the State had "obtained everything that it could recover in th[e] case," *id.* at 314. That disposition reflects that a State may be required by its own governing law to accept a proffered payment settling a claim. A similar principle might apply more broadly if the normal contract-law principle of mutual assent, 1 Restatement (Second) of Contracts § 18, at 53 (1981), were displaced by a statute requiring a private plaintiff to accept a defendant's full payment of a disputed sum. Such a principle would be inapplicable here, however, because Rule 68 specifies that "an unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b).

San Mateo County v. *Southern Pacific Railroad*, 116 U.S. 138 (1885), is even further afield. In *San Mateo*, the County accepted two payments from the defendant railroad. *Id.* at 138-139, 141. Because the two payments taken together exceeded the "entire sum estimated by the [County] to be due," *id.* at 141, this Court held that "the debt for which the suit was brought ha[d] been unconditionally paid and satisfied," so that the plaintiff county "no longer [had] an existing cause of action." *Id.* at 141-142. Although *San Mateo* reflects that a plaintiff's actual acceptance of full payment can extinguish a

claim, the decision does not address the effect of a *declined* settlement offer.

Little v. *Bowers*, 134 U.S. 547 (1890), similarly involved a railroad's challenge to municipal property taxes on a writ of error to this Court, which the city moved to dismiss on the ground that the plaintiff railroad had "paid and satisfied [its tax obligation] in full" and had paid the city its "costs in the case." *Id.* at 548-549. The Court concluded that the railroad's payment "was in the nature of a compromise, by which the city agreed to take, and the [railroad] agreed to pay, a less sum than was originally assessed." *Id.* at 556; see *id.* at 549-550. Dismissal was warranted, the Court concluded, because "[t]he effect of [that compromise] was to extinguish the controversy between the parties." *Id.* at 556. As in *San Mateo*, the Court did not address the effect of a rejected settlement proposal.

5. Although an unaccepted offer of complete relief cannot moot a plaintiff's claim, courts should be reluctant to expend judicial and litigation resources adjudicating the merits of a demand for relief that the defendant informs the court it will fully satisfy. That legitimate impulse, however, suggests that the court should enter judgment *for* the plaintiff, not against him. That is the proper course for a court to follow if the plaintiff identifies no additional relief that he could realistically obtain, cf. Fed. R. Civ. P. 54(c), and if further litigation would serve no other legitimate purpose. In the present circumstances, however, it would have been inappropriate for the district court to terminate this suit by entering judgment in respondent's favor on his individual claim, even if petitioner had requested that disposition below. Because that disposition would have prevented respondent from invoking the cost-sharing mechanisms of Rule

23, it would not have provided respondent complete relief on the (individual and class) claims asserted in his complaint.

"[T]he principle of party presentation [is] basic to our adversary system," *Wood* v. *Milyard*, 132 S. Ct. 1826, 1833 (2012), which rests on the "premise that the parties know what is best for them" and "rel[ies] on the parties to frame the issues for decision," *Greenlaw* v. *United States*, 554 U.S. 237, 243-244 (2008). A defendant therefore may elect not to contest liability and to litigate only the scope of relief. Or a defendant may decide not even to contest relief. If a defendant knowingly accepts an adverse judgment for the full relief sought rather than litigating the merits, a court may rely on that choice by exercising its discretion to enter judgment upon it. See *Genesis HeathCare*, 133 S. Ct. at 1536 (Kagan, J., dissenting); see also, *e.g.*, *Tanasi*, 786 F.3d at 200; *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009).[6]

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[6] Although a court's entry of judgment pursuant to the defendant's surrender is sometimes described as "moot[ing]" the claim, *e.g.*, *Tanasi*, 786 F.3d at 200, that characterization is imprecise. While a defendant's capitulation may obviate the need for the court to make an independent assessment of the merits, the court nevertheless *adjudicates* the claim when it renders judgment pursuant to the defendant's consent. Unlike most judgments, however, a judgment based on the defendant's consent ordinarily will have no future issue-preclusive effect, because the merits of the case are not "actually litigated and determined" and because the judgment does not rest on a resolution of the merits. *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (citation omitted); see 1 Restatement (Second) of Judgments § 27 cmt. e, at 257 (1982) (Absent an agreement that the judgment will have issue-preclusive effect, issue preclusion does not apply "[i]n the case of a judgment entered by confession, consent, or default.").

When a plaintiff has asserted a colorable class-wide claim, however, a court would abuse its discretion by entering judgment for the plaintiff on his individual claim before resolving the question of class certification. If the plaintiff has asserted a class claim, an offer of full relief for his individual claim alone fails to "offer[] all that has been requested in the complaint (*i.e.*, relief for the class)." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). As a result, "[a]cceptance [of such a less-than-complete offer] need not be mandated," *ibid.*, when the question of class certification remains outstanding.

Rule 23 confers upon plaintiffs a "procedural right" to "assert their own claims in the framework of a class action." *Roper*, 445 U.S. at 332. Allowing a plaintiff to proceed on his individual claim within a class action serves important policy interests. A plaintiff may utilize the class-action mechanism to distribute the costs of litigation across the class. *Id.* at 338 & n.9. A defendant can reduce the litigation expenses that multiple lawsuits might entail, since a judgment favorable to the defendant will bind all class members. Consolidation of claims likewise can conserve limited judicial resources. By contrast, "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained," would "frustrate the objectives of class actions," would be "contrary to sound judicial administration," and would "invite waste of judicial resources by stimulating successive suits brought by others." *Id.* at 339 (dictum).

B. Under *Roper*, Respondent Would Retain A Sufficient Interest To Pursue Class Certification Even If His Individual Claim Were Moot

Because petitioner's unaccepted settlement offer did not moot respondent's individual claim, the Court need not address the second question presented. But if the Court concludes that the unaccepted offer did moot the individual claim, respondent would retain a separate financial interest in class certification that would allow his action to remain live through the district court's class-certification decision. That proposition follows from this Court's decision in *Roper*, which petitioner has not asked the Court to overrule. Pet. Br. 33. If the court subsequently certifies a class, the class would "acquire[] a legal status separate from the interest asserted by the [named plaintiff]," *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), that would itself be sufficient to allow a full adjudication of the merits.

In *Roper*, the plaintiffs brought a putative class action for damages. After the district court denied class certification, the court entered judgment for the plaintiffs (over their objection) and dismissed their suit based on the defendant's offer to pay the plaintiffs' individual claims in full. 445 U.S. at 329-330. The defendant then paid the judgment into the court registry. *Id.* at 330.

This Court held that the entry of judgment for the named plaintiffs on their individual claims did not moot their "individual and private case or controversy," because they retained an ongoing "economic interest in class certification" that allowed them to appeal the adverse certification ruling. *Roper*, 445 U.S. at 332-333. The Court held that the plaintiffs possessed an economic interest in class certification because certification would enable them to recover attorney's fees

and costs by "allocating such costs among all members of the class who benefit from any recovery." *Id.* at 334 n.6, 336, 338 n.9. Cf. *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478-479 (1980) (holding that named plaintiff may obtain common-fund fee award from a money judgment obtained by a class). The Court explained that the class-certification ruling was "collateral to the merits" of the litigation, and that the court of appeals could adjudicate the plaintiffs' challenge to that ruling without "passing on the merits of the substantive controversy." *Roper*, 445 U.S. at 336.

Respondent possesses precisely the same economic interest as the *Roper* plaintiffs in shifting his litigation expenses to the class. To be sure, *Roper* involved an appeal from the denial of class certification, whereas the district court made no certification ruling in this case. But if a named plaintiff's "economic interest in class certification" (445 U.S. at 333) is sufficient to allow him to appeal an adverse certification ruling, notwithstanding the defendant's full payment of the plaintiff's individual claim, the same interest is likewise sufficient to allow the plaintiff to litigate that collateral issue in district court either directly or on remand from an appeal.

Petitioner argues (Br. 33) that *Roper* is "inapplicable" here because *Genesis HealthCare* "made clear that *Roper* is limited to its facts." That is incorrect. *Genesis HealthCare* acknowledged *Roper*'s holding that "the named plaintiffs possessed an ongoing, personal economic stake" in "shift[ing] a portion of attorney's fees and expenses to successful class litigants." 133 S. Ct. at 1532. The Court also noted that *Roper* contained dicta emphasizing the importance of class-certification decisions and the undesirability of allowing defendants to "pick off" named plaintiffs, *ibid.*, and it expressly declined to con-

sider whether *Roper*'s "continuing validity" had been eroded by subsequent decisions, *id.* at 1532 n.5. Petitioner has not asked this Court to overrule *Roper*. Cf., *e.g.*, *Alabama* v. *North Carolina*, 560 U.S. 330, 355 n.6 (2010) (declining to overrule precedent *sua sponte* without the benefit of argument from the parties). Under that decision, respondent would retain a sufficient interest to pursue class certification in district court even if petitioner's settlement offer had rendered his individual claim moot.[7]

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[7] Although "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit," *Steel Co.*, 523 U.S. at 107, respondent clearly had Article III standing when he filed his complaint. The determination whether the district court was divested of the Article III jurisdiction it initially possessed is governed by doctrinal rules different from, and somewhat less rigid than, those governing the initial standing inquiry. See *Laidlaw*, 528 U.S. at 189-192 (discussing exceptions to mootness that would not support Article III standing). It is particularly appropriate to distinguish between these two contexts because respondent, in making his initial decision to commence suit, could legitimately rely on the potential for cost-shifting provided by the Rule 23 mechanism. See Resp. Br. 32, 35, 41-43.

In *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990), the Court held that, where an intervening statutory amendment had deprived the plaintiff of any continuing stake in the underlying merits issue, the plaintiff's interest in recovering its attorney's fees—which the plaintiff could have recovered only if it ultimately "'prevail[ed]' by winning the relief it seeks" at the end of the case—did not provide a constitutionally sufficient basis for continued appellate litigation of that merits question. *Id.* at 478, 480. That holding is not logically inconsistent with *Roper*'s conclusion that a plaintiff's "economic interest in class certification" as a predicate to a common-fund fee award based on the class's own recovery can enable him to pursue such certification as a discrete matter "collateral to the merits." 445 U.S. at 333, 336. Indeed, even after lawsuits are resolved on the merits, parties frequently continue to

II. PETITIONER IS NOT ENTITLED TO "DERIVATIVE SOVEREIGN IMMUNITY"

Petitioner argues (Br. 35-50) that it is entitled to "derivative sovereign immunity" because its alleged violation of the TCPA occurred while petitioner was executing its contract with the Navy. That is incorrect.

The government utilizes contractors to perform various functions on the government's behalf. In doing so, the government ordinarily can authorize contractors to take actions that the government could lawfully perform itself. That principle flows, not from any derivative "immunity" from liability for unlawful acts, but from the common-law rule that a principal may delegate to its agents its own "privilege" to take certain actions *lawfully*. That common-law agency rule does not aid petitioner, however, because the government never authorized petitioner to send text messages to unconsenting recipients.

1. Federal agencies are not subject to the substantive prohibitions imposed by the TCPA. The TCPA prohibits "any person" from taking specified actions, 47 U.S.C 227(d)(1), without defining the term "person" to include the United States or its agencies. The parties appear to agree that the United States and its agencies are not "person[s]" within the meaning of the TCPA. See Resp. Br. 8; Pet. Br. 2, 8. Cf. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) (explaining that the term "person" is presumed "not [to] include the sovereign" when Congress has imposed new obligations on such persons).[8]

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litigate disputed collateral issues concerning their respective entitlements to fees and costs.

[8] This Court has held that the wiretap provisions of the Communications Act, 47 U.S.C. 605, apply to government agents as "per-

Federal agencies may conclude that the performance of particular governmental functions warrants making calls that, if made by a private person, would violate the TCPA. The Census Bureau, for instance, could conclude that its duty to conduct the decennial census, see 13 U.S.C. 141(a), warrants use of automated telemarketing and texting outreach to contact and identify members of the population without their advance consent. The TCPA does not prohibit such governmental calls, and it need not be read to prohibit the government from directing private contractors to make such calls on its behalf.

In various contexts, particular entities are "privileged to do an otherwise tortious act," 2 Restatement (Second) of Agency § 343 cmt. c, at 105 (1958), when a privilege "result[s] from the consent of another" or is "created by the law irrespective of consent," 1 *id.* § 217 cmt. a, at 469. Because the TCPA's prohibitions do not apply to federal agencies, those agencies possess a privilege to engage in conduct that private parties are forbidden to undertake. Ordinarily such "privileges are delegable," *i.e.*, the privilege holder can lawfully authorize another to perform the privileged act on the holder's behalf. *Ibid.* Whether a "privilege[] created by statute" is delegable or must be "exercised personally" is ultimately a question of statutory construction. 1 *id.* § 17 cmt. b, at 86; see 2 *id.* § 345 cmt. a, at 108.

By contrast, "an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997) (citing *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J.,

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sons" under those provisions. See *Nardone* v. *United States*, 302 U.S. 379, 382-383 (1937). In the government's view, the term "person" in the TCPA carries a different meaning. That issue, however, is not before this Court.

concurring)). Immunities thus can "protect an admitted wrongdoer from civil liability" because "an overriding public policy" justifies the grant of immunity. 2 Restatement (Second) of Agency § 347 cmt. a, at 111. Although "sovereign immunity shields the Federal Government and its agencies from suit" absent a statutory waiver, *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), a determination that the government is immune from a particular suit does not mean that the challenged governmental conduct was lawful. It simply means that courts are not authorized to grant *relief* based on the asserted violation of a legal duty. An immunity is thus quite different from a privilege, which serves to *legitimize* the conduct of the privilege-holder or his appropriate delegee.

Likewise, the qualified immunity held by individual officials is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity, like immunity more generally, "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-528. So long as the official's actions did not violate a "clearly established" right, qualified immunity is warranted even when "the plaintiff's claim * * * in fact has merit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (citation omitted).

2. At common law, "[i]mmunities, unlike privileges, are not delegable and are available as a defense only to persons who have them." 1 Restatement (Second) of Agency § 217 cmt. b, at 470; see 2 *id.* § 347 cmt. a, at 111 ("Immunities * * * are strictly personal to the individual and cannot be shared."). That principle is reflected in this Court's decisions rejecting claims that a government agent or contractor shares in the United States' sovereign immunity.

In *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922) (Holmes, J.), the Court rejected the government's contention that the Emergency Fleet Corporation—a corporation wholly owned by the government and vested by the government with "enormous powers"—"share[d] the immunity of the sovereign from suit." *Id.* at 566; see *id.* at 565. The Court held that, because the United States' "immunity does not extend to those that acted in its name," an "agent [of the government], because he is agent, does not cease to be answerable for his acts." *Id.* at 567-568.

The Court reached the same result in *Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 576 (1943), in which a private contractor operated a government-owned vessel on behalf of the United States Maritime Commission. When a customs inspector died from an accident on that vessel, the contractor argued that it was "non-suable for [its] torts" because it could be sued only pursuant to the statutory waiver of the government's sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (1940). See 317 U.S. at 576-577. The Court rejected that contention, holding that the contractor could not obtain "[i]mmunity from suit" "by reason of a contract between [it] and the [federal government]." *Id.* at 583. Although the Court assumed that Congress "would have the power to grant immunity to private operators of government vessels for their torts," it found "not the slightest intimation" that Congress intended to make "such a basic change in one of the fundamental laws of agency" by "abolish[ing] all remedies that might exist against a private company for torts committed during its operation of government vessels under [government] agency agreements." *Id.* at 579-581.

Petitioner relies heavily on decisions concerning the *qualified* immunity enjoyed by individuals who perform services for the government and are sued for alleged wrongs they have committed while serving in that capacity. See Pet. Br. 36-39 (repeatedly citing, *e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012)). Petitioner identifies no decision of this Court holding that a corporation (as distinct from an individual) is entitled to qualified immunity. And the existence of the qualified-immunity doctrine as a separate limit on potential liability simply underscores that persons who act on the government's behalf do not automatically share the government's own immunity from suit. The Court's qualified-immunity jurisprudence therefore provides no support for petitioner's proposed general rule that government contractors are entitled to "derivative sovereign immunity."[9]

3. Petitioner principally relies (Br. 35, 37-41) on *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Petitioner's reliance on that decision is misplaced. The Court in *Yearsley* did not confer derivative immunity on a government contractor, but rather recognized that the government could lawfully authorize its contractor to take actions that the government itself could lawfully take.

In *Yearsley*, the government contracted with a construction company to redirect the Missouri River as specified in the contract, which resulted in the erosion of

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[9] Even assuming *arguendo* that private corporate entities could be entitled to qualified immunity in some circumstances, the question of qualified immunity is not before this Court. The courts below did not resolve any claim to such immunity, and petitioner did not seek review on a qualified-immunity question, Pet. i, let alone demonstrate that it meets the distinct requirements of a qualified-immunity claim.

about 95 acres of the Yearsleys' land. 309 U.S at 19-20. The Yearsleys' land "was intended to be washed away as a necessary part of the federal project" because the project required it to be "washed away to a point predetermined by the Government" under the contract's "detailed specifications." U.S. Amicus Br. at 5-6, *Yearsley*, *supra* (No. 39-156); see Pet. Br. at 6, 21, *Yearsley*, *supra*. The contractor's work washing away the Yearsleys' land thus "was all authorized and directed by the Government." 309 U.S. at 20.

The Yearsleys sued the contractor, but this Court held that the contractor could not be held liable for eroding their land. Although the Court assumed that the actions authorized by the government would constitute a "taking" of property, it concluded that such actions were "within [the government's] constitutional power" because the government by statute had "impliedly promised to pay [just] compensation." *Yearsley*, 309 U.S. at 21-22; see, *e.g.*, *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). The Court further held that, because the government could lawfully take the Yearsleys' property, it could "validly confer[]" on its contractor the authority to do so. 309 U.S. at 22. The court explained that "no ground [existed] for holding [a government] agent liable who is simply acting under the authority thus validly conferred" because, in such circumstances, "[t]he action of the agent is 'the act of the government.'" *Ibid.* (citation omitted).

Although the Court in *Yearsley* did not discuss the distinction between "privileges" and "immunities," the Court held that the government had "validly conferred"

on the contractor the government's own lawful authority to take the Yearsleys' land. At common law, "[a]n agent is privileged to do what otherwise would constitute a tort if his principal [1] is privileged [2] to have an agent do it and [3] has authorized the agent to do it." 2 Restatement (Second) of Agency § 345, at 108; see 1 *id.* § 17 & cmts. a-b, at 85-86 (delegable privileges); 2 *id.* § 347, at 110 (no immunity).[10] Thus, if the United States possesses a privilege to take an action that others could not lawfully take, and if that privilege is not a "personal" (*i.e.*, non-delegable) one, a contractor may perform the action on the government's behalf if the government so directs. The contractor in such circumstances is insulated from liability, not because it possesses an "immunity" from suit, but because its conduct is *lawful*.[11]

That understanding of *Yearsley* is consistent with the Court's approach to the preemption of state-law tort claims against a contractor in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). The Court in *Boyle* held

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[10] If the principal does not authorize the agent's action in advance but later ratifies it, that ratification will also release the agent from liability to a third party if the agent's actions would have been lawful if authorized. 2 Restatement (Second) of Agency § 360 & illus. 2, at 135-136.

[11] In *Brady*, the Court cited *Yearsley* as reflecting that "government contractors obtain certain immunity" when performing work under government contracts. 317 U.S. at 583. The Court in *Brady* also observed, however, that in *Yearsley* the government had "validly conferred" authority to take the actions at issue. *Ibid.* (citation omitted). *Brady*'s passing use of the term "immunity" thus appears to reflect a more colloquial use of the term. Cf. 2 Restatement (Third) of Agency § 7.01, at 136 (2006) (noting that courts sometimes "use 'immunity' language interchangeably with 'privilege' in the context of an agent's individual liability for tortious interference").

that state-law design-defect claims involving military equipment are preempted "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

Boyle teaches that certain state-law claims against contractors are preempted when allowing those claims "would produce the same effect sought to be avoided" by the FTCA's exception for "discretionary functions." 487 U.S. at 511. The Court in *Boyle* did not hold or suggest, however, that the application of state tort law to federal contractors is *categorically* preempted. Rather, the prerequisites to *Boyle* preemption described above ensure that the United States has actually authorized its contractor to take the allegedly tortious action with full knowledge of its potentially harmful effects. Similarly with respect to federal statutory prohibitions, requiring governmental authorization to engage in conduct that would be unlawful absent a delegation of the government's privilege facilitates the government's ability to balance the need for such action against the countervailing policies that animate the general prohibition.[12]

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[12] Petitioner relies in part (Br. 41, 47, 49-50) on the United States' petition-stage brief in *KBR, Inc* v. *Metzgar*, 135 S. Ct. 1153 (2015) (denying certiorari). That brief addressed the circumstances in which a state-law tort claim will be preempted by principles drawn from the FTCA's "combatant activities" exception, which preserves the sovereign immunity of the United States from claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j). The government argued that, in circumstances where "a similar claim against the United States would be within the FTCA's combatant-activities exception," a claim against the government's

4. In any particular case, the determinations whether the government has a privilege to act, whether that privilege is delegable, and whether the government has authorized an agent to perform a particular act that "otherwise would constitute a tort" will turn on an analysis of the relevant statutory or constitutional context in light of background agency principles. The FCC is currently considering requests to clarify that a federal agency (*e.g.*, the Census Bureau) may utilize private contractors to make calls on behalf of the agency, even in circumstances where similar calls would violate the TCPA if they were made on behalf of a private entity. See FCC, Public Notice, 29 FCC Rcd. 13,916, 13,916-13,917 (2014); FCC, Public Notice, 29 FCC Rcd. 11,268, 11,268 (2014). But regardless of whether and under what circumstances a federal agency may delegate its privilege to make such calls lawfully under the TCPA, petitioner could not invoke such a privilege here because the Navy never authorized petitioner to send text messages to unconsenting individuals.

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contractor should ordinarily be preempted "as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." U.S. Cert. Amicus Br. at 15-16, *KBR*, *supra* (No. 13-1241). The government's position in that case rested on the broad text of the combatant-activities exception and on the ground that the "military's effectiveness would be degraded if its contractors were subject to the tort law of multiple States for actions occurring in the course of performing their contractual duties arising out of combat operations." *Id.* at 14. That brief reflects the government's view that the protections afforded to federal contractors depend in part on the nature of the services they perform and the government interests involved; it does not support the categorical rule of "derivative sovereign immunity" that petitioner advocates.

The summary-judgment evidence, which at this stage of the case must be construed in the light most favorable to respondent, indicates that petitioner agreed "to send [the] messages only to cellular users that had consented to solicitation," and that petitioner "was not authorized to send texts to individuals who had not opted in." Pet. App. 2a, 4a. As explained above, the ability of an agent to invoke a privilege held by its principal depends on, *inter alia*, the principal's decision to delegate its own authority to act. Although the Navy could lawfully have sent recruiting text messages to respondent and other unconsenting recipients, the record does not suggest that it delegated that privilege to petitioner. Thus, even if petitioner had argued that its own conduct was lawful, rather than attempting to invoke the United States' immunity from suit, its argument would lack merit under the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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